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In the Supreme Court of the United States

October Term, 1941

Nos. 324 and 325

(Supreme Court of Ohio Nos. 31,014 and 31,015.)
(Court of Appeals Eighth District Nos. 20,495 and 20,496.)
(Probate Court of Cuyahoga County Nos. 282,711 and 282,850.)

MARGARET WEISENBACH, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF ANNA HATT, DECEASED,

Petitioner,

vs.

JOHN R. KISTNER, AS ANCILLARY ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ANNA HATT, DECEASED, AND ANNA LATHAM,

Respondents.

PETITION FOR WRITS OF CERTIORARI
To the Supreme Court of the State of Ohio
and
BRIEF IN SUPPORT OF PETITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. ..... and .....

(SUPREME COURT OF OHIO NOS. 31,014 AND 31,015.)
(COURT OF APPEALS EIGHTH DISTRICT NOS. 20,425 AND 20,551.)
(PROBATE COURT OF CUYAHOGA COUNTY NOS. 382,711 AND 382,859.)

MARGARET WEISENBACH, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF ANNA HATT, DECEASED,

Petitioner,

vs.

JOHN R. KISTNER, AS ANCILLARY ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ANNA HATT, DECEASED, AND ANNA LATHAM,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF OHIO.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now comes Margaret Weisenbach, both individually and as executrix of the will of Anna Hatt, deceased, and petitions the Court for a writ of certiorari to the Supreme Court of Ohio in each of the cases numbered, respectively, 31,014 and 31,015, in said Court in which judgments or decrees were entered, in each case, on the 21st day of May, 1947, reading as follows:

Entry on Appeal as a Matter of Right:

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of ..... County, as upon the motion of the appellee to dismiss

the appeal, filed as of right herein, and was argued by counsel.

"On consideration whereof, it is ordered and adjudged *sua sponte* that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

"It is further ordered and adjudged that the appellee recover from the appellant his costs herein expended, taxed at $.....

"ORDERED, That a special mandate be sent the Probate Court of Cuyahoga County, to carry this judgment into Execution.

"ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, 'for entry'."

Entry on Motion to Certify the Record:

"It is ordered by the Court that this motion be, and the same hereby is, overruled."

Applications for re-hearing were denied on June 4th, 1947.

STATEMENT OF JURISDICTION.

The presentation of a petition for writ of certiorari seeking review of the Supreme Court of Ohio judgments is based upon the contention that this Court has jurisdiction upon appeal to review the judgments in question as provided in Title 28, U. S. C. A., Section 344, paragraph (b), Section 237, Judicial Code as amended, wherein it is stated that a review may be had where any title, right, privilege or immunity is specifically set up or claimed by either party under the constitution; and *the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.* Specifically, it is the contention of the petitioner that the Supreme Court of Ohio by its dismissing on May 21, 1947, *sua sponte*, the appeals as a matter of right and in overruling the motions to certify the record to that court, and further

by denying the applications for rehearing on June 4th, 1947, left erroneously decided a question involving a construction of Article IV, Section 1, known as the full faith and credit clause of the Constitution of the United States, adverse to the petitioner's contentions, and, it is believed, contrary to the purpose and intent of the Constitution, the Act of Congress, and the decisions of this Court.

This is an appeal on questions of law from the judgment of the Supreme Court of Ohio dismissing, *sua sponte*, the appeals from the orders of the Court of Appeals, Cuyahoga County, Ohio, entered on February 17, 1947, affirming the decision of the Probate Court in each of the cases numbered 20,425 and 20,551 which were heard together in said Supreme Court of Ohio under cases numbered 31,014 and 31,015.

This application for appeal is presented on September ..., 1947, the time within which this petition might be filed having been extended by order of Court entered on August 21st, 1947.

The former of said cases involves the errors incident to granting a motion filed by John R. Kistner, as ancillary administrator of the estate of Anna Hatt, to vacate and set aside the entry in the Probate Court admitting the will of Anna Hatt to probate and appointing Margaret Weisenbach executrix thereof, on the ground that a purported will of later date had been admitted to probate in Wayne County, Michigan, even though the order of the Cuyahoga County Probate Court admitting an exemplified copy of the alleged Michigan will to record and appointing Kistner ancillary administrator thereunder had been made without the notice required by law, and though in fact on the same day and at the same time, as shown by the record (R. 167), the Probate Judge granted a motion of the executrix-appellant to vacate and set aside the order admitting to record the said alleged will from Michigan and appointing said Kistner as ancillary administrator there-

under. Domicile of the decedent was the important issue raised in the trial.

The latter of said cases involves the errors incident to admitting the exemplified copy of said alleged will and the order of probate from Michigan to record in the Probate Court of Cuyahoga County again and appointing John R. Kistner ancillary administrator thereunder, all over the objections of the executrix-appellant. Domicile of the decedent was again the important issue raised in the trial.

The questions involved in these two cases at bar are substantial in character and the petitioner's grounds are given below. The principal question in the cases was whether the deceased had changed her domicile from Ohio to Michigan and the Probate Court, the Court of Appeals and the Supreme Court of Ohio construed the full faith and credit clause of the United States Constitution (Article IV, Section 1) to be applicable to a Wayne County, Michigan, Probate Court decree admitting a purported later will to probate, and as requiring the Probate Court of Cuyahoga County, Ohio, to at least consider as evidence of very great weight the finding in said decree that the decedent was an "inhabitant" of Wayne County, Michigan, at her death, although the proceedings in that court had been purely *in rem* and without notice to the petitioner herein, which construction of said constitutional provision is contrary to the well settled decisions of the Supreme Court of the United States.

It is a well settled principle of law that the full faith and credit clause does not apply to determinations of jurisdiction in cases involving the administration of estates of deceased persons. *Thormann vs. Frame,* 176 U. S. 350 (1900); *Tilt vs. Kelsey,* 207 U. S. 43 (1907); *Burbank vs. Ernst,* 232 U. S. 162 (1914); *Baker vs. Baker, Eccles and Company,* 242 U. S. 394 (1917); *Overby vs. Gordon,* 177 U. S. 214 (1900); *Riley vs. New York Trust Co.,* 315 U. S.

343 (1941); *Colvin vs. Jones,* 194 Mich. 670 (1917); *Frederick vs. Wilbourne,* 198 Ala. 137 (1916); *Matter of Paris,* 176 N. Y. S. 879 (1919); *Manuel vs. Manuel,* 13 O. S. 458 (1862); *Domenchini vs. Hoosac Tunnel, etc., R. Co.,* 90 Vt. 451 (1916); *Matter of Horton,* 169 App. Div. 292 (1915).

It is also a well settled principle of law that an incompetent is presumed to have insufficient mental capacity to change his domicile. *Coppage vs. Clinton,* 72 F. 2nd 531 (1934); *McCambell vs. McCambell,* 13 F. Supp. 847 (1936); *In re Edmundson,* 109 Pa. Super. 495 (1933); *In re Collins,* 11 N. J. Misc. 233 (1932); *Commonwealth vs. Kernochan,* 129 Va. 405 (1921); *Stanfield vs. Hursey,* 36 Ga. App. 394 (1927). Incompetency, once established, is presumed to have continued. See *Kennedy vs. Walcutt,* 118 O. S. 442 (1928).

Further, it is also a well settled principle of law that the burden of proof is on the one asserting that an earlier domicile was abandoned in favor of a later one. *Mitchell vs. United States,* 88 U. S. 350 (1874); *Texas vs. Florida,* 306 U. S. 398 (1939).

The question of domicile in the cases at bar was the important issue raised in the Probate Court of Cuyahoga County, Ohio, in the trial of each case in that Court. The issue was presented by opening statement, evidence introduced and by oral argument. The full faith and credit clause of the Federal Constitution (Article IV, Section 1) was held by the Probate Judge to be controlling, first in his oral decision in the former case on May 2, 1946, and again in his written opinion in the decision of the latter case on September 17, 1946, which opinion is printed (R. 20), and analyzed in the brief submitted herewith.

Thereafter, the errors re domicile, incompetency and full faith and credit were presented by assignments of errors in both the Court of Appeals and Supreme Court of Ohio.

The Probate Court and Court of Appeals of Cuyahoga County, Ohio, both felt themselves bound by the finding

of the Probate Court of Wayne County, Michigan, under the full faith and credit clause of the Federal Constitution. The Probate Judge said on page 1 (R. 20) of his opinion:

> "The question before the court is whether under the full faith and credit clause of the Constitution it is mandatory that this Court respect the judgment of the Wayne County Probate Court in admitting this will to record."

Clearly he found that he was bound by the constitutional provision to accept the Michigan court's decree at its face value. Further, the Probate Judge failed to note that in the cases at bar the Michigan proceedings were without any service on, or notice to, the petitioner herein, when he quoted *Black on Judgments,* 2nd Edition, paragraph 857, to the effect that the state courts, following the Federal decisions, hold that a court having jurisdiction of the *parties* and subject matter, its judgments are conclusive on the merits in the courts of every other state. The Probate Judge gave manifest importance to the finding of the Probate Court of Wayne County, Michigan, that the decedent was an "inhabitant" of Wayne County, Michigan, at the time of her death. This finding is not admissible as evidence under the well established decisions of the Supreme Court of the United States. The Probate Judge in the fourth from the last paragraph of his opinion, clearly showed that he placed the burden on this petitioner to prove that Anna Hatt had *not* recovered from her incompetency, and that she had *not* changed her domicile prior to her death. These findings are contrary to the well established decisions of the Supreme Court of the United States.

The Court of Appeals of Cuyahoga County, Ohio, approved the application of the full faith and credit clause of the Federal Constitution to the decree of the Michigan court, at least to the extent of treating the finding in that decree that Anna Hatt was an "inhabitant" of Wayne

County, Michigan, at her death, as important evidence that there had been a change in her domicile from Ohio to Michigan. That court also placed the burden on the petitioner to prove that there had been *no* change in domicile instead of on the other side of the case to prove that there had been such a mental improvement as would have permitted a change in domicile and that Anna Hatt in fact changed her domicile. Despite the testimony of a psychiatrist that Mrs. Hatt was suffering from progressive mental illness as long as a year before her death, the court took the position that she could still be considered as being able to change her domicile like any ordinary, competent person, and assumed, *without evidence*, that she had done so.

The Supreme Court of Ohio by dismissing, *sua sponte*, the appeal as a matter of right and overruling the motions to certify the record to that court, and by overruling the applications for rehearing, for the stated reason that no debatable constitutional question was involved, erred, and left erroneously decided a question involving a construction of Article IV, Section 1, known as the full faith and credit clause of the Constitution of the United States, adverse not only to the petitioner's contention, but it is believed contrary to the purpose and intent of the Constitution, the Act of Congress, and the decisions of this Court.

Copies of the opinions of the Probate Judge of Cuyahoga County, Ohio, and of the Court of Appeals are printed in the Record submitted herewith at pages 20 and 12, respectively.

QUESTIONS PRESENTED.

First. The first question presented is whether the Supreme Court of Ohio erred in dismissing, *sua sponte*, the appeals as a matter of right and in overruling the motions to certify the record to that court since the principal question in the cases was whether the deceased had changed her domicile from Ohio to Michigan and both the Probate

Court and the Court of Appeals had construed the full faith and credit clause of the United States Constitution (Article IV, Section 1) to be applicable to a Wayne County, Michigan, Probate Court decree admitting a purported later will to probate, and as requiring the Probate Court of Cuyahoga County to at least consider as evidence of very great weight the finding in said decree that the decedent was an inhabitant of Wayne County, Michigan, at her death, although the proceedings in that court had been purely *in rem* and without notice to the petitioner herein, which construction of said constitutional provision is contrary to the well settled decisions of the Supreme Court of the United States.

Second. The second question presented is whether the Supreme Court of Ohio erred in its ruling that an alleged will of a testator *domiciled in Ohio* may be admitted to probate in another State, in a proceeding *in rem*, without notice to the citizens of Ohio interested in said estate and an exemplified copy of said order of probate brought to Ohio and there be entitled to record under the full faith and credit clause of the Constitution of the United States, over objection duly taken thereto, and in face of uncontroverted evidence that the domicile of the decedent had been in Ohio for more than forty (40) years, that her husband and a son, who was her only issue, had died and were buried in Cleveland, that she had consistently expressed the intention to keep Cleveland her legal residence and to be buried there with them, and that this intention persisted long after she became too incompetent to form an intention to change her domicile and had been placed under guardianship by the courts both in the State of Ohio and in the State of Michigan, although no guardian had actually been appointed in Ohio at the time of her death, but her estate substantially all having always been situated in Cuyahoga County, Ohio.

Third. The third question presented is whether the Supreme Court of Ohio erred in disregarding the well

settled decisions of the Supreme Court of the United States that a finding of domicile or residence in a Court of one State in connection with the administration of the estate of a decedent in that state is not admissible as evidence of the fact of domicile in another state in the absence of notice to the adverse parties or participation in the former case by them.

Fourth. The fourth question presented is whether the Supreme Court of Ohio erred in disregarding the well settled law that a person proved to be too mentally incompetent to change his domicile and who has been placed under guardianship as a mental incompetent, is presumed to have continued unable to change his domicile and that the burden is on those claiming a change, to prove the change.

Fifth. The fifth question presented is whether the Supreme Court of Ohio erred in disregarding the well settled law that a person placed under guardianship as a mental incompetent is presumed to be, and to continue to be, unable to form an intention to change his domicile.

Sixth. The sixth question presented is whether the Supreme Court of Ohio erred in refusing to review the latter case where Mr. Kistner was permitted to attempt to prove that he was, individually, a creditor of the estate and therefore an interested party, as required by statute, to present the exemplified copy of the alleged Michigan will to record in Ohio, *by his own testimony,* over objection made under the Ohio Statute prohibiting a party testifying where the adverse party is executor, administrator, devisee or legatee of a decedent's estate.

Seventh. The seventh question presented is whether or not the Supreme Court of Ohio erred in disregarding the conduct of attorney Edgar S. Mansfield, the Michigan attorney for Anna Latham (and as such is associate counsel with John R. Kistner in the cases at bar), who, in opposing the guardianship in Ohio, had asked, in the midst of the

guardianship hearing, for a continuance so that he could bring witnesses in an effort to prove the decedent to be competent, and that he had used the time thus gained to go into the Probate Court of Wayne County, Michigan, and without notice to the applicant in the Ohio guardianship proceeding, his counsel, the Probate Judge in Cuyahoga County, the executrix-appellant or her counsel, and have himself appointed guardian of the estate of Anna Hatt, knowing that her estate was in Cuyahoga County, that she was incompetent and that her legal residence was in Cuyahoga County, Ohio, and not in Michigan.

Eighth. The eighth question presented is whether the Supreme Court of Ohio erred in holding that no constitutional question was involved where the constitution was held in the lower courts, contrary to law and the decisions of this Court, to be *applicable* to the cases at bar, thereby holding, of necessity, that in order to have a constitutional question there must be a case where the lower courts have improperly held the constitutional provision in question to be *inapplicable.*

Ninth. The ninth question presented is whether the Supreme Court of Ohio erred in disregarding other errors apparent in the record.

REASONS FOR THE ALLOWANCE OF THE WRITS.

The petitioner respectfully urges that writs of certiorari should be allowed for the following reasons:

First. In refusing to review the orders of the Cuyahoga County Court of Appeals, the Supreme Court of Ohio left erroneously decided, a question involving construction of Article IV, Section 1, known as the full faith and credit clause of the Constitution of the United States, adverse to the petitioner's contentions, and, it is believed, contrary to the purpose and intent of Congress, and the decisions of this Court.

Second. The cases are of great general and public interest and importance because they involve the question of what credit or weight is to be given under the United States Constitution in the courts of one state to the judgment or decree in a Probate Court of another state admitting an alleged will to probate, particularly in respect to a finding therein of the domicile of the decedent.

Third. A determination of the issues by this Court is essential in order that the petitioner, and those similarly affected, may discharge the duties of executor according to the laws of their respective states and according to the Constitution of the United States and Acts of Congress.

Fourth. The decision of the Supreme Court of Ohio deprives the petitioner of a right, privilege, or immunity in that a misconstruction of the full faith and credit clause of the constitution of the United States resulted from the refusal of Ohio courts to hold that the clause of the constitution had no application to the cases at bar.

Fifth. In refusing to review these cases, the Supreme Court of Ohio failed to recognize that questions similar to this in the matter of domicile and jurisdiction have been passed upon by this Honorable Court, and further, that the identical question now submitted to the Court has been passed upon by the courts of last resort in various states in the United States and that, in every instance, the opinions of these courts have upheld the contentions made by your petitioner.

Sixth. This case is one of great general and public interest because it involves a conflict of jurisdiction and law between the courts of Ohio and those of Michigan.

Seventh. This Court should hear and determine the cases at bar because of the effect of the misconduct of counsel in the guardianship matter preceding the death of the testatrix.

Eighth. This Court should hear and determine the cases because of the fact that John Kistner was permitted to testify, over objection, in his own behalf, against the decedent's estate, contrary to the statute and the well established principles of law applicable to the situation.

It is respectfully submitted by your petitioner that it is necessary that this Honorable Court settle the questions, not only on account of their importance, but also on account of the fact that the decisions of the Supreme Court of Ohio conflicts with the decisions of not only this Court but of so many other courts of last resort.

Attached hereto is the Brief of Petitioner in support of the petition for said writs of certiorari, to which reference is respectfully made for discussion of the law involved and of the authorities in support of the rights claimed on behalf of the petitioner.

WHEREFORE, your petitioner respectfully requests that this Court issue writs of certiorari to the Supreme Court of the State of Ohio to certify and send to this Court a full and complete transcript of the records herein, to the end that the causes may be reviewed and determined by this Court as provided by law, that the judgments may be reversed with costs, and for such other and further relief as may be appropriate and granted in the premises.

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. . . . . and . . . . . .

(Supreme Court of Ohio Nos. 31,014 and 31,015.)
(Court of Appeals Eighth District Nos. 20,425 and 20,551.)
(Probate Court of Cuyahoga County
Nos. 382,711 and 382,859.)

MARGARET WEISENBACH, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF ANNA HATT, DECEASED,

Petitioner,

vs.

JOHN R. KISTNER, AS ANCILLARY ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF ANNA HATT, DECEASED, AND ANNA LATHAM,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF OHIO.

FACTS.

Anna Hatt lived with her husband in greater Cleveland for more than forty years. (R. 63.) Her property consisted of real estate, second mortgages on real estate, land contracts and money in various banks, (R. 115-116) and was and is all situated in Cleveland, Ohio (R. 128), except a very small amount of money sent weekly to Michigan for the care of Anna Hatt during her visit to, and last illness in, Detroit. Her husband and son are both buried in Cleveland and she always planned to keep her legal residence there for the remainder of her lifetime and to be

buried with them. (R. 88, 110, 112, 114 & 116.) After the death of her husband she depended upon their most intimate friend of more than ten years standing, Mrs. Margaret Weisenbach, to guide and assist her not only in her personal but her business affairs as well. (R. 88 & 89.) She had her own attorney, Steven W. Kormendy, prepare a power of attorney under which Mrs. Weisenbach wisely and efficiently managed her property up to the date of her death. (R. 116.)

Mrs. Hatt's attorney, Mr. Kormendy, at her instance prepared a will for her in which she devised and bequeathed one-half of her estate to Margaret Weisenbach, and one-half to a niece, Anna Latham, who lived in Detroit. (R. 180.) Both the power of attorney and the will were prepared and executed in October, 1942. (R. 116.) The record (R. 88 & 91) also show that Mrs. Hatt moved into Mrs. Weisenbach's home and made arrangements to keep that her legal residence at all times even though she expected to visit Mrs. Latham in Detroit at different times. She sold nearly all of her furniture and during her last illness Mrs. Latham sent for most of her clothing (R. 94 & 95) but she retained her home with Mrs. Weisenbach and the real estate in Cuyahoga County in which she had lived with her husband. She also retained her other real estate and all of her investments and kept them in Cleveland. She made all tax returns from Cleveland. (R. 115.) She repeatedly expressed her intention to not only keep her legal residence in Cleveland, but to be buried in Cleveland beside her family. (R. 88, 110, 112, 114 & 116.)

During February, 1943, Mrs. Hatt went to Detroit for a visit with Mrs. Latham. While there she became ill and was too ill to return to Cleveland until July, 1943. During her illness she had lost more than thirty pounds of weight and had become so weak mentally that she never again instituted a conversation by herself, but would sit and stare for hours at a time without giving any indication of being

conscious of anything going on around her. Thereafter she also had hallucinations and was mentally incompetent to a very high degree. (R. 107.) She did not even know what city she was in. (R. 73 & 86.) Her condition was of such a character that it could not possibly have improved between that time and the time of her death. (R. 73, 74, 75 & 79.)

However, Mrs. Weisenbach took Mrs. Hatt to Detroit for visits at different times. (R. 89.) During a visit with Mrs. Latham in the fall of 1944, Mrs. Latham learned that she had property, which fact Mrs. Hatt had always desired to keep secret from her, and Mrs. Latham thereupon took an interest in Mrs. Hatt and her affairs which she had not shown before. Mrs. Latham immediately employed a Detroit attorney, Edgar F. Mansfield, to prepare a will and a power of attorney for Mrs. Hatt, which power of attorney ran to Edgar F. Mansfield and John R. Kistner, the latter of Cleveland. (R. 31.)

When they sought to act under that power of attorney, Mrs. Weisenbach and Mrs. Hatt's attorney, Steven W. Kormendy, who was consulted by Mrs. Weisenbach about the matter, decided that in view of Mrs. Hatt's mental condition they could not recognize that power of attorney, nor could Mrs. Weisenbach safely continue to act under the former power of attorney.

They, therefore, immediately filed an application in the Probate Court of Cuyahoga County for Mr. Kormendy to be appointed guardian of Mrs. Hatt's estate (R. 44), and they then took counsel and Dr. K. S. West, a psychiatrist of the highest standing (R. 71 & 72), to Detroit and, with Mr. Mansfield's approval, and in his presence, Dr. West examined Mrs. Hatt. (R. 72 & 73.) He found that she was mentally incompetent to a high degree, and that her condition was one of a gradually developing deterioration both physically and mentally. (R. 79.) Service of notice of the pending application for guardianship was immediately

made. See sheriff's return. (R. 47.) The hearing on the guardianship proceeded according to the notice and Mr. Mansfield apppeared in court to oppose the guardianship. (R. 69.) In the midst of the hearing, Mr. Mansfield asked for (R. 87) and was granted (R. 97) a continuance for the opportunity of bringing witnesses to Cleveland. (R. 87.) He used the time thus gained to go into the Probate Court of Wayne County, Michigan, and, without notice to Mrs. Weisenbach or Mr. Kormendy or their counsel or to the Probate Judge in Cuyahoga County, to have himself appointed guardian of Mrs. Hatt's estate on the ground of her mental incompetency. (R. 59, 60 & 61.) (Dr. West had examined her on January 19th, 1945. Anna Hatt then did not have sufficient mentality to know what city she was in. She thought she was in fact in Cleveland. (R. 73 & 86.) The psychiatrist in Detroit who testified in support of the Michigan guardianship on the ground of mental incompetency examined her on January 27th, 1945, which was the very day on which the purported Michigan will, which is the subject of the litigation in the case at bar, purports to have been executed. (R. 144 & 145.) The application of Anna Latham in the Probate Court of Wayne County was executed on February 7, 1945 (R. 60), and filed February 8th, 1945 (R. 59 & 61), asking for the appointment of Edgar F. Mansfield as guardian of the estate of Anna Hatt on the ground that she was mentally incompetent.) A copy of Mr. Mansfield's appointment was filed in the Probate Court of Cuyahoga County, Ohio, and, although the evidence of Mrs. Hatt's legal residence and domicile in Cleveland for more than forty years and her expressed intention to retain her legal residence there was not controverted, and although the Probate Judge found in the record (R. 105) that the applicant, Steven W. Kormendy, was qualified by ability and integrity to be her guardian, the Probate Judge refused to appoint a guardian. The Probate Judge even found in his journal entry that Mrs. Hatt was

mentally incompetent and a legal resident of Cuyahoga County, but still refused to appoint a guardian. (R. 52.)

That case was taken to the Court of Appeals, where the Probate Judge was reversed because of his refusal to appoint a guardian, and the case was remanded to the Probate Court for further proceedings according to law. (R. 55 & 56.) The Probate Judge then informed counsel that he did not intend to carry out the order of the Court of Appeals because he claimed he could not understand what it meant. For that reason a motion to certify the case was duly filed in the Supreme Court of Ohio, in case number 30552, in an effort to get that court either to direct the Court of Appeals to make the appointment or to order the Probate Judge to do so in such positive terms that it could not be avoided.

The Supreme Court apparently found the order sufficient because it overruled the motion to certify. Thus the Court of Appeals order became a final order. The mandate from the upper court reached the Probate Court and was filed therein on February 5th, 1946. (R. 57 & 58.)

Mrs. Hatt died on February 26, 1946, before the case was set down for further action in the Probate Court. The course of that guardianship litigation, including Dr. West's testimony and the entire bill of exceptions, is in evidence in the cases at bar.

The fact of the death of Anna Hatt was not disclosed to Mr. Kormendy, Mrs. Weisenbach or their counsel, until the 18th day of April, 1946, although every week Mrs. Weisenbach was sending Mrs. Hatt a money order for forty dollars ($40.00), and although Mrs. Latham, through Mr. Mansfield as her counsel, had gone into the Probate Court of Wayne County and secured an order on the 8th day of April, 1946, admitting the alleged will of Mrs. Hatt to probate. No notice was given to Mrs. Weisenbach or her counsel of that proceeding. This is the same paper which it is claimed was executed on the 27th day of January, 1945,

the very day on which a psychiatrist examined Mrs. Hatt, at the instance of Mr. Mansfield and Mrs. Latham, and found her to be mentally incompetent. It was on the testimony of that psychiatrist that Mr. Mansfield had had himself appointed guardian of Mrs. Hatt's estate which, in Michigan, consisted of only the money sent by Mrs. Weisenbach to Mrs. Hatt for her board, room and expenses while visiting her niece.

The real will (R. 180) of Mrs. Hatt was admitted to probate in the Probate Court of Cuyahoga County in case number 382,711 on April 22nd, 1946, and letters testamentary duly issued to Mrs. Weisenbach. This will had been executed when Mrs. Hatt was still entirely competent, had been prepared for her by her own attorney and at her own instance. (R. 116.)

An exemplified copy of the alleged Michigan will (R. 144) was admitted to record by the Probate Judge of Cuyahoga County on April 25, 1946, but he assigned the case a new number, to wit: 382,859 (R. 135 & 136 (title omitted from printed record)), apparently for the purpose of avoiding the statute which required notice to be given to the executrix already appointed and qualified. (Section 10504-27, General Code of Ohio.) The Probate Judge thereupon appointed John R. Kistner ancillary administrator with the alleged will annexed. Kistner then filed a motion to vacate the probate of the Ohio will of Mrs. Hatt and the appointment of Mrs. Weisenbach as executrix thereunder. Mrs. Weisenbach filed a motion to vacate the order admitting the alleged Michigan will to record in Ohio and the appointment of Kistner as administrator w.w.a. thereunder. Both motions were heard on the 2nd day of May, 1946, and *both motions were granted.*

Case number 20425 in the Court of Appeals and 31014 in the Supreme Court of Ohio involved the appeal of Margaret Weisenbach, both individually and as executrix of the will of Anna Hatt, on questions of law, from the order

of the Probate Judge granting the motion of John R. Kistner as ancillary administrator, to set aside the probate of the Ohio will and the appointment of the executrix thereunder.

On September 17th, 1946, after a waiver of notice by the executrix-appellant made with full reservation of opposition to the admission to record of the alleged Michigan will on all grounds, the Probate Judge granted the application of Kistner, individually, to admit the alleged Michigan will to record and appointed Kistner ancillary administrator thereunder.

Case number 20551 in the Court of Appeals and 31015 in the Supreme Court of Ohio involved the appeal on questions of law by Margaret Weisenbach, both individually and as executrix of the will of Anna Hatt, from that order. The evidence in favor of the alleged Michigan will consisted solely of the decree of the Wayne County, Michigan, Probate Court admitting it to probate, which decree contained a finding that Anna Hatt was an inhabitant of Wayne County, Michigan, at her death (R. 141 & 142) and the admitted fact that Anna Hatt was physically in Wayne County, Michigan, at the time of her death.

Both of the cases were appealed to the Supreme Court of Ohio as a matter of right (R. 8) and also by motions to certify the record (R. 6 & 7) (cases 31014 and 31015, respectively), where the court ruled that no debatable constitutional question was involved (R. 2), dismissed the appeals and overruled the motions to certify the record on May 21st, 1947. (R. 2.) Applications for rehearing (R. 3) were denied on June 4, 1947. (R. 3.)

The facts hereinbefore set forth were in evidence to show the domicile of Anna Hatt in Ohio for more than forty years including the frequently expressed intention on her part to keep Cleveland her residence and to be buried there with her family after her death (R. 88, 110, 112, 114 & 116); that her tax returns were all made from Cleveland (R. 115);

that her estate was essentially all located in Cleveland (R. 128); her illness, in 1943, resulting in great physical and mental depreciation, the visits to her niece, Anna Latham, in Detroit, the guardianship proceedings in Cuyahoga County, Ohio, not only in the Probate Court and Court of Appeals but in the Supreme Court of Ohio, case number 30552, the guardianship proceedings in Wayne County, Michigan, the evidence of her extreme mental depreciation by January, 1945, the fact that she was past seventy-four years of age (R. 44, 60 & 144), and looked and acted many years older (R. 73), and the progressive character of her depreciation, both mentally and physically. (R. 79.)

The proceedings in Michigan for probate of the alleged Michigan will were strictly *in rem* and without notice to Margaret Weisenbach either individually or as executrix of the Ohio will of the decedent, or to her counsel.

ANALYSIS OF PROBATE JUDGE'S OPINION.
(R. 20 to 25.)

The Probate Judge said on page 1 of his opinion:

> "The question before the court is whether under the full faith and credit clause of the Constitution it is mandatory that this Court respect the judgment of the Wayne County Probate Court in admitting this will to record."

Clearly he found that he was bound by the constitutional provision to accept the Michigan court's decree at its face value.

The errors of the Probate Judge are disclosed by his quotation of 23 *O. J.*, Sec. 471, page 790, which infers that a judgment *in rem* is within the full faith and credit clause of the Constitution even when jurisdiction has not been obtained over the person of the adverse party. A mistake is again disclosed by the unlimited statement on page 3 of his opinion that "if a foreign court has jurisdiction" its judgments are binding upon the courts of a sister state.

He was evidently confusing the case at bar with one in which a foreign court has jurisdiction of both the subject matter *and of the parties.*

The Probate Judge also quoted *Black on Judgments,* 2nd edition, paragraph 857, to the effect that the state courts, following the Federal decisions, hold that a court having jurisdiction of the parties and subject matter, its judgments are conclusive on the merits in the courts of every other state, but he failed to note that in the case at bar the Michigan proceedings were without any service on, or notice to, the petitioner herein, or that the Supreme Court of the United States had held that such proceedings were not entitled to full faith and credit, so that it was the duty of the Ohio Court to examine the question of domicile and adjudicate that issue for itself.

A similar error occurred in the Probate Court's discussion of *Symons v. Eichelberger,* 110 O. S. 234 (1924).

The Probate Judge in his opinion mentioned the language in the alleged Michigan will, "I, Anna Hatt, of the City of Detroit," etc. It will be noted that the language does not say that she was a resident or inhabitant of Michigan or that she was domiciled there. The language must also be considered in view of the evidence in the record that the decedent was mentally incompetent to a high degree and under guardianship in both Ohio and Michigan as such, and that she was definitely domiciled in Cuyahoga County, Ohio, when she became incompetent to such a degree that she did not know where she was. If any weight should attach to said language in the Michigan will, then certainly greater weight should be given to similar language in the Ohio will (R. 180) which was made when she was entirely competent.

Clearly, the statement of Anna Latham in her application to probate the Michigan will is self-serving, is merely an allegation in a pleading, and is not evidence in the cases at bar.

Then we come to the manifest importance the Probate Judge gave to the finding by the Probate Court of Wayne County, Michigan, that the decedent was an inhabitant of Wayne County, Michigan, at the time of her death. This finding was not even admissible as evidence in the cases at bar under the well established decisions of the Supreme Court of the United States.

Next the Probate Judge discusses his claim that he could not understand the mandate from the Court of Appeals in the guardianship case in which he had been reversed because of his refusal to appoint a guardian. We submit that the mandate was clear and positive in its terms and believe that no further comment is needed in respect thereto.

In the fourth from the last paragraph of his opinion, the Probate Judge shows clearly that he placed the burden on this petitioner to prove that Anna Hatt had *not* recovered from the mental state in which our evidence showed her to be in January, 1945 (she died February 26, 1946); that she had *not* changed her domicile from Cuyahoga County, Ohio; that her guardianship as a mental incompetent had *not* been terminated; and that her domicile had *not* been changed prior to her death. Those things the law does not require the petitioner to prove. Under the authorities we cite in this brief, the burden was on the person who applied for admission of an exemplified copy of a Michigan will to record in Ohio to prove that he was an interested person, as required by statute; that the decedent before her death had regained at least a sufficient mental state to form an intention to change her domicile; and that she did or said something sufficient for that purpose. No effort was made to prove any improvement in her mental state or any change in domicile. This failure to offer proof indicates in a case of this importance that the decedent continued to be under the advanced mental disability she was under when placed under guardianship, at which

time, as shown by the record, she did not even have enough mentality to know where she was, thinking she was in Cleveland when she was in fact in Detroit. See Dr. K. S. West's testimony. It will be noted that Dr. West testified that her mental depreciation was of a progressive character and was accompanied by great physical depreciation. (R. 73, 79 and 86.)

In his opinion, the Probate Judge does not disclose, as the record clearly shows (R. 30 to 32), that he permitted Kistner to testify over objection duly made, that he was a creditor of the decedent. If a party can prove that he is a creditor of a decedent by his own testimony, in the face of objection made on behalf of the estate, and leave to other evidence only the question of how much his claims amount to, then the great protection thrown by the statute, Sec. 11495 of the General Code of Ohio, quoted at page 46 of this brief, would be largely destroyed.

In that state of the record, the Probate Judge should have been reversed.

ANALYSIS OF OPINION OF COURT OF APPEALS.
(R. 12 to 16.)

The opinion of the Court of Appeals suggests with apparent approval that the Probate Judge considered himself bound by the finding of the Probate Court of Wayne County, Michigan, but says further that he had indicated that if a "positive showing" had been made that Anna Hatt was domiciled in Cuyahoga County, Ohio, at her death, he would have entertained the probate of her will. In other words, the Court of Appeals approved the application of the full faith and credit clause of the United States Constitution to the decree of the Michigan Court, at least to the extent of treating the finding in that decree that Anna Hatt was an inhabitant of Wayne County, Michigan, at her death, as important evidence that there had been a change in her domicile from Ohio to Michigan.

A careful reading of the opinion of the Court of Appeals discloses that that court also placed the burden on the petitioner to prove that there had been no change in domicile instead of on the other side of the case to prove that there had been such a mental improvement as would have permitted a change in domicile and that there had been, in fact, a change in domicile.

The Court of Appeals gave great significance to the finding in the Michigan court decree that the decedent at death was an inhabitant of the County of Wayne. The Court of Appeals mentioned the examination of Anna Hatt by Dr. West, the psychiatrist, in January of 1945. It was as a result of the extreme progressive character of her mental and physical depreciation at that time that she was placed under guardianship in both states. At R. 14 the Court of Appeals mentions that the record is silent as to whether Mrs. Hatt's mental condition improved or deteriorated between that time and the time of her death. Clearly, the Court of Appeals took the position that although a person was mentally incompetent to such a high degree that she did not know where she was in January, 1945, and suffering from *progressive* mental illness at that time and shortly thereafter having been placed under guardianship in both states, she could still be considered as being able to change her domicile like any ordinary, competent person. It is our position, that when we established her domicile in Cuyahoga County, Ohio, for more than forty (40) years and her continually expressed intention to keep that county and state her legal residence, and to be buried there with her husband and son, and the fact of the guardianship proceedings, including the decrees in both the Probate Court of Cuyahoga County and the Court of Appeals, we had gone as far as the law required us to go, and that the burden was then upon the other side to show a change in domicile by evidence, and we believe they would have tried to do so, if any possible evidence of that character had been available.

It seems, also, that the Court of Appeals dismissed too lightly the important error of the Probate Judge in holding that a person may prove by his own testimony, over objection duly taken thereto, that he is a creditor of an estate. The exemplified copy of the alleged Michigan will was not presented by Kistner as attorney for the executrix named therein, but by Kistner individually.

It is also significant in the cases at bar that the petitioner is the one who was attacked. The Ohio will, made when Anna Hatt was fully competent and not under restraint of any kind, had been admitted to probate and the petitioner duly appointed and qualified as executrix thereunder, when the respondent came into court with an exemplified copy of a decree of the Michigan court and made the attack. Just as a purely procedural matter, aside from all of the other reasons herein set forth, the aggressor must surely do something to make his case or he should lose.

LAW.

The full faith and credit clause of the Constitution of the United States appears in Article IV, Section 1, which reads as follows:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

It has been decided in many cases that decrees in proceedings *in rem* in the courts of one state involving the domicile of a deceased person are not judgments which come within the provision of the full faith and credit clause of the Constitution.

It seems that a constitutional question is involved just as clearly where a constitutional provision has been

improperly construed as applying to a case as where it has been improperly construed as *not* applying. In other words, the constitution can no more be used improperly as a sword, than its protection as a shield can be improperly withheld.

The Supreme Court of the United States has frequently held that the full faith and credit clause of the Constitution does not apply to determinations of jurisdiction. In the case of *Thormann vs. Frame,* 176 U. S. 350, 20 Supreme Court 446, 44 L. Ed. 500 (1900), the deceased died at New Orleans leaving a will describing himself as a resident of the State of Wisconsin. A daughter, claiming he died intestate, obtained letters of administration in Louisiana where the court made a finding of residence of the decedent in that state. The will was then offered for probate in the State of Wisconsin by beneficiaries therein mentioned, and the daughter appeared in the Wisconsin court and objected to the probate. Upon trial the Wisconsin court found the decedent's residence at the time of his death to be Wisconsin and admitted the will to probate. This judgment was affirmed by the Supreme Court of Wisconsin and a writ of error was taken to the United States Supreme Court. The decisions of the Wisconsin courts were affirmed, the Supreme Court stating at page 356 of its opinion:

> "Again it is thoroughly settled that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction. *Thompson vs. Whitman,* 18 Wall. 457; *Cole vs. Cunningham,* 133 U. S. 107; *Grover and Baker Sewing Machine Company vs. Radcliffe,* 137 U. S. 287; *Simmons vs. Saul,* 138 U. S. 439; *Reynolds vs. Stockton,* 140 U. S. 254; *Cooper vs. Newell,* 173 U. S. 555."

The same question arose in an inheritance tax proceeding in the case of *Tilt vs. Kelsey,* 207 U. S. 43, 28 Supreme

Court 1, 52 L. Ed. 95 (1907). There the will of a decedent was probated in the State of New Jersey where the Surrogate in his decree found him to be a resident at the time of his death. The executors proceeded with the administration of the estate and completed final distribution. Thereafter the comptroller of the State of New York filed a claim in the Surrogate's Court of New York for the New York transfer tax on all of the personal property of the decedent located both within and without the State of New York. Over the objection of the executors, the Surrogate found for the comptroller, determined that the decedent had died a resident of New York State and assessed the tax. That ruling was affirmed by the Supreme Court and the Court of Appeals of the State of New York. Upon appeal to the Supreme Court of the United States, the court said at page 51:

> "That reexamination, however, must be confined to the single question whether by the assessment of the tax full faith and credit has been denied to the judicial proceeding of the State of New Jersey in violation of Article IV, Section 1, of the Constitution. In the consideration of this question, the first inquiry which presents itself is whether the adjudication of the New Jersey court, that Tilt was at the time of his death a resident of New Jersey, was conclusive upon the State of New York, a stranger to the proceedings. If it was that is the end of the case, because then New York could not take the first step necessary to bring the estate within the provision of the tax law of that state. But upon principle and authority that adjudication, though essential to the assumption of jurisdiction to grant letters testamentary, was neither conclusive on the question of domicile, nor even evidence of it in a collateral proceeding."

In *Burbank vs. Ernst*, 232 U. S. 162, 34 Supreme Court 299, 58 L. Ed., 551 (1914), the decedent died in Texas leaving a will which was duly admitted to probate in that state. When the executors sought to have the will re-

corded in Louisiana the plaintiff opposed registration and brought an action in the Louisiana courts to annul the will on the ground that the testator died a resident of Louisiana and that under that law the will was void. The Supreme Court of Louisiana entered judgment against the will and denied the application for registry. An appeal was thereupon taken to the United States Supreme Court on the ground that full faith and credit had not been given the decree of the Texas Court finding the domicile of the decedent to be in that state and admitting the will to probate there. The Supreme Court, however, affirmed the finding of the Louisiana courts and stated that even though the jurisdiction of the Texas court depended upon the place of domicile of the decedent at the time of his death that fact was open to reexamination by the Louisiana courts.

In *Baker vs. Baker, Eccles and Company,* 242 U. S. 394, 37 Supreme Court 152, 61 L. Ed. 386 (1917), the decedent died leaving the bulk of his property in Tennessee but a substantial amount of stock in a Kentucky corporation. Under the laws of Tennessee all of his estate would pass to his widow, while under the Kentucky law half would go to this mother. The widow, in a proceeding in the Tennessee court, obtained letters of administration and a finding that the decedent had died domiciled in Tennessee. She then brought in the Tennessee courts an action in equity, with service by publication on the mother, a Kentucky resident, and obtained by default, a decree finding that as the widow she was entitled to all of the Kentucky stock. She then entered the Kentucky courts in a suit to enforce the Tennessee decree and to have the stock issued to her. This suit was dismissed by the lower court and upon appeal the Kentucky Court of Appeals found that the Tennessee order granting the widow letters of administration and the Tennessee decree finding her entitled to all of the stock were both invalid as against the mother.

The court further found that the decedent had actually died a resident of Kentucky and that half of the stock in question should go to the mother. A writ of error was thereupon taken to the Supreme Court of the United States on the question as to whether or not the Kentucky court's order had given full faith and credit to the Tennessee findings as to the domicile of the decedent and the distribution of the estate in Kentucky. The Supreme Court in affirming the judgment of the Kentucky court held that the matter of the adjudication of domicile by the Tennessee court was, under the decisions in *Thormann vs. Frame, supra,* and *Overby vs. Gordon,* 177 U. S. 214 (1900), not entitled to full faith and credit by the Kentucky court, but was a matter which could be independently determined by the courts of Kentucky and that the decree of the Tennessee court, which had been made on service by publication upon the defendant, lacked due process of law, making the decree invalid both within and without the State of Tennessee as an action *in personam* against a non-resident who had neither been served with process nor personally appeared.

A situation almost exactly the reverse of that presented in the cases at bar arose in *Colvin v. Jones,* 194 Michigan 670, 161 N. W. 847 (1917). In that case the decedent died in Toledo and the plaintiff was appointed administrator by the Lucas County Probate Court, which found the decedent to have died a resident of Lucas County, Ohio. Subsequently the defendant was appointed administrator by the Lenawee County, Michigan, Probate Court which determined that the decedent had died a resident of Michigan. The plaintiff, who was a first cousin of the half blood and thus unable to inherit under Michigan law, brought a bill in equity in the Michigan courts to set aside the finding of domicile by the Michigan Probate Court and to require the Michigan administrator to turn over the assets in Michigan to him. The defendant demurred to the bill and the demurrer was sustained.

In examining the holding of the lower court, the Supreme Court of Michigan said at page 678:

> "Admitting that the Ohio court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity, within that state, of the grant of letters of administration, it did not possess the power to conclusively bind all the world as to the fact of domicile by a mere finding of such a fact in a proceeding *in rem*. *Overby vs. Gordon*, 177 U. S. 214, 20 Supreme Court 603, 44 L. Ed. 741; *Tilt vs. Kelsey*, 207 U. S. 43, 28 Supreme Court 1, 52 L. Ed. 95; *Bringham vs. Fayerweather*, 140 Mass. 411, 5 N. E. 265. The Michigan court had an equal right to determine the question of domicile for the same purpose. We must therefore deny the contention of plaintiffs that the decision of the Ohio court conclusively established that the domicile of the decedent was in the State of Ohio."

See also *Frederick vs. Wilbourne*, 198 Ala. 137, 73 S. 442 (1916); *Matter of Paris*, 107 Misc. 463, 176 N. Y. S. 879 (1919); *Domenchini vs. Hoosac Tunnel, etc., R. Co.*, 90 Vt. 451, 98 A. 982 (1916).

The decision of the Supreme Court of the United States in the case of *Overby vs. Gordon*, 177 U. S. 214 (1900), has conclusively determined that a finding of domicile of a decedent in a proceeding *in rem* in a state court is not even to be considered as evidence of the domicile of the decedent in litigation outside the state where such finding has been made. In that case, the plaintiff, widow of the decedent, petitioned in the District of Columbia Court for letters of administration with will annexed alleging that the decedent died a resident of the District of Columbia and that the major proportion of the assets of his estate were located within the District. The defendants, next of kin, answered contesting the validity of the will offered by the plaintiff claiming that the decedent died a resident of the State of Georgia. A jury trial was had upon these issues and the defendants offered in evidence the certified tran-

script of proceedings in a Georgia court. The transcript showed the finding that the decedent had died a resident of the State of Georgia and the appointment of an administrator by the Georgia Court.

The trial court of the District of Columbia, however, refused to admit the transcript in evidence and the jury found that the decedent was domiciled in the District of Columbia at the time of his death.

Upon appeal to the Court of Appeals of the District, the judgment of the trial court was affirmed and a writ of error was taken to the Supreme Court of the United States.

The Supreme Court in affirming the courts below, held that the Georgia decree was a valid decree *in rem* only in so far as it affected the property in the estate of the decedent situated within that state. Since, however, it was an *ex parte* proceeding to which the defendants in the action were not parties, it could not conclusively bind all the world as to the fact of the decedent's domicile and it was further held to be of no probative value in the District of Columbia action and was, therefore, properly excluded from the evidence.

The court said at page 227:

> "We are of the opinion that the DeKalb County Court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile, by a mere finding of such a fact in a proceeding *in rem*. In other words, proceedings which were substantially *ex parte* cannot be allowed to have greater efficacy than would a solemn contest *inter partes*, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.
>
> Our conclusion being that the adjudication of the fact of domicile in Georgia made in the grant of letters

> by the DeKalb County Court, and which was not made in a contest *inter partes*, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicile of the deceased."

The holding in *Overby vs. Gordon, supra,* was expressly followed in *Matter of Horton*, 169 App. Div. 292 (1915). In that case a will was offered for probate in the Surrogate's Court of Westchester County, New York, the widow of the decedent appeared and opposed application alleging that a later will had already been admitted to probate in Lake County, Ohio. An exemplified copy of the Ohio Probate Court's decree admitting the Ohio will to probate was offered in evidence but was excluded as not being evidence of the domicile of the decedent. The Surrogate thereupon found for the applicant and admitted the New York will to probate. Upon appeal, the Appellate Division affirmed the lower court, saying, at page 295:

> "The respondent against the appellant's assertion contends that the decree of the Ohio court did not bar inquiry into the domicile of the decedent; that it was not even competent evidence of the fact of domicile as neither the proponent nor the heirs at law, nor the next of kin were parties to the proceeding in which the decree was made; that the Surrogate of Westchester County had the power to decide that the decedent was a resident within his jurisdiction; and, if he so decided; that he had jurisdiction of the probate of the decedent's will.
>
> "Sustained by authority, we approve this contention and affirm the decree with costs. (*Overby vs. Gordon*, 177 U. S. 214; *Tilt vs. Kelsey*, 207 id. 43.)"

The reasoning of the Appellate Division in this decision was approved by the New York Court of Appeals although the decision was reversed on other grounds, because domicile had not been made an issue at the trial in that case. (See 217 N. Y. 363 (1916) at page 371.)

In the case of *Riley vs. New York Trust Company*, 315 U. S. 343 (1941), Julia Hungerford died in 1935, a resident of Fulton County, Georgia. Her will was admitted to probate in the Probate Court of that county after notice to all interested parties, including personal service on the husband who lived in the State of New York. The decree in the Georgia Court probating the will contained a specific finding that the decedent was domiciled in Georgia. Thereafter, the husband secured the probate of the will in New York and the appointment of the New York Trust Company as administrator w.w.a. The New York Court made a finding that the decedent was domiciled in New York State, that being the domicile of her husband. Under the Georgia law, the husband, by renouncing the will, would not be entitled to a larger share of her estate than given him by the will, but in New York, by such renunciation, he would be entitled to one-half of her personal estate, which was greatly to his benefit. The decedent owned certain stock in the Coca-Cola Corporation, the certificates of which were in possession of the executors in Georgia. The corporation was incorporated in Delaware. Both the Georgia executors and the New York administrator w.w.a. sought to secure the stock. The Coca-Cola Corporation interpleaded in the courts in Delaware. The trial court found in favor of the Georgia executors under the full faith and credit clause of the Constitution of the United States. The Supreme Court of Delaware reversed the lower court, finding that the full faith and credit clause did not apply. Petition for certiorari was granted by the Supreme Court of the United States which sustained the Supreme Court of Delaware. The first paragraph of the

syllabus of the decision of the Supreme Court of the United States reads as follows:

> "Consistently with the full faith and credit clause of the Federal Constitution, when a state court in probating a will and issuing letters testamentary, in a proceeding to which all distributees were parties, expressly finds that the domicile of the testator at the time of his death was in that State, the adjudication of domicile does not bind one who is subsequently appointed as domiciliary administrator, c.t.a., in a second state in which he will be called upon to deal with the claims of local creditors, including the claim of the state itself for taxes, and who was not a party to the proceeding in the first state; and in this situation, the courts of a third state, when disposing of local assets claimed by both the personal representatives, are free to determine the question of domicile in accordance with their own law."

There is a note at the bottom of page 353 of the court's opinion where numerous state court cases are cited supporting the principles relied on by petitioner in the cases at bar.

Attention is also called to the annotation in 121 *A. L. R.* 1200, which cites many cases on the subject and seems to be an able and comprehensive review of the law.

Counsel has not been able to locate any reported case having facts similar to the cases at bar where the decision would support the ruling of the Ohio Courts in either of the cases at bar.

Attention is drawn at this time to two cases counsel for respondents has cited in his brief opposing motion to certify to the Ohio Supreme Court. The first *In Re Estate of Frey*, 139 O. S. 354, 22 O. O. 411 (1942), was cited in an effort to sustain a claim that the petitioner is appealing from an order of probate. His position is not sound because the cited case merely holds that an order admitting a lost, spoliated or destroyed will to probate is not reviewable on appeal but must be attacked, if at all, by

contest in the same manner as wills not lost, spoliated or destroyed must be attacked after original probate. Of course every order admitting a will to original probate is subject to direct attack only by contest of that will. But by the express terms of Section 10504-69 of the General Code of Ohio, foreign wills cannot be contested in Ohio. That section reads as follows:

> "Foreign will cannot be contested here.—No proceeding shall be had in this state to contest a will executed and proved according to the law of a state or territory of the United States, or of a foreign country, relative to property in this state, but if such will be set aside in the state, territory or country in which it is executed and proved, it shall be of no validity in this state as to persons claiming under it, with notice of its being set aside, and as to all other persons, from the time an authenticated copy of the final order or decree setting it aside, is filed in the office of the probate judge of the county in which the will is recorded."

Section 10501-56 of the General Code provides that any final order of the Probate Court may be appealed from. That section reads as follows:

> "Cases appealable from probate court to court of appeals; appeal to common pleas court, when,—An appeal on a question of law and fact may be taken to the court of appeals in all cases in which the court of appeals has appellate jurisdiction, by a person against whom it is made, or whom it affects, from any order, decision or judgment of the probate court in the manner and within the time provided by law for the prosecution of such appeals from the court of common pleas to the court of appeals. The cause so appealed shall be tried, heard and decided in the court of appeals in the same manner as such appeals from the court of common pleas are tried, heard and decided in the court of appeals.
>
> "From any final order, judgment or decree of the probate court, an appeal on a question of law may be prosecuted to the court of appeals in the manner and within the time provided by law for the prosecution

> of such appeals from the court of common pleas to the court of appeals. For the purpose of prosecuting appeals on questions of law, and of law and fact from the probate court, the probate court shall hereafter be deemed to be exercising judicial functions inferior only to the court of appeals and the supreme court. If, for any reason, a record has not been taken at the hearing of any matter before the probate court so that a bill of exceptions or a complete record may be prepared as provided by law in courts of common pleas, then an appeal on questions of law and fact may be taken to the court of common pleas by a person against whom it is made, or whom it affects, from any order, decision, or judgment of the probate court in the manner provided by law for the prosecution of such appeal from the court of common pleas to the court of appeals. The court of common pleas shall advance said matter for hearing."

Section 12223-2 of the General Code defines a final order. It reads as follows:

> "Final order defined, subject to review, etc. An order affecting a substantial right in an action when in effect it determines the action and prevents a judgment, or an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, or an order vacating or setting aside a general verdict of a jury and ordering a new trial, is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial, as provided in this title."

Since the Michigan will is not subject to be contested in Ohio, the order admitting it to record in Cuyahoga County was a final order and under the statutes quoted above was subject to attack by appeal on questions of law.

It is clear that the filing of a contest of the alleged Michigan will in Michigan by Margaret Weisenbach, both individually and as executrix of the real will of the decedent, on jurisdictional grounds, as well as mental incapacity of the testatrix, and undue influence exercised over

her, did not detract in any way from the right and duty of the Ohio courts to determine the issues in the cases at bar without application of the full faith and credit clause of the United States Constitution to the decree in Michigan admitting said purported will to probate.

Mr. Kistner also suggested in his brief that "No effort has been made so far in these cases to attack the jurisdiction of either of these Courts." That is the issue we have been trying to make from the beginning of this litigation. The very substantial authorities cited in our briefs in all of the courts below go to the proposition that the Probate Court of Wayne County, Michigan, was entirely without jurisdiction under the circumstances of the cases at bar to entertain an application to probate an alleged will of Anna Hatt and if it did so, such alleged will would not be entitled to record in Ohio.

Finally, Mr. Kistner cited the case of *Hopper vs. Nicholas,* 106 O. S. 292 (1922), in reference to the full faith and credit to be given in the State of Ohio to an adjudication by a court of record in another state. When it is borne in mind that Margaret Weisenbach, neither individually nor as executrix, had any notice of or in any way participated in the proceedings in Michigan, it is clear that the cited case is not authority for Mr. Kistner's contention. The first paragraph of the syllabus reads as follows:

> "When a proceeding to probate a will is pending in another state, in a court of record, authorized by law to adjudicate the questions arising therein, and one fact necessary to establish the jurisdiction of the court is finding that the residence of the deceased was at death within the territorial jurisdiction of such court, and a person interested in such estate as an heir of the deceased, and a devisee under the will proposed to be probated, enters appearance in such proceeding, admits the jurisdictional fact, consents to adjudication, participates thereafter in the proceedings and receives benefits thereunder, such person and those claiming through and under him are estopped by the judgment therein."

The court said at page 300:

> "Aside from the question of participation and 'the taking of the fruits,' it has been consistently held that *where a court has jurisdiction to determine the fact, and the party is before the court,* the party cannot afterwards in a collateral proceeding question the judgment, whether the facts before the court warranted the judgment or not." (Italics ours.)

Clearly the full faith and credit clause of the Constitution of the United States is limited to cases in which the Court in which the judgment or decree in question was entered had jurisdiction of the person as well as of the subject matter.

The ruling of the State Courts in the cases at bar is contrary to the well established law hereinbefore cited and also to the rule of law that an incompetent is presumed to have insufficient mental capacity to change his domicile.

The question of the ability of an incompetent to change his domicile arose in *Coppage vs. Clinton,* 72 F. 2nd 531 (1934), where the incompetent, a full blooded Indian, brought an action by his next friend, in a United States District Court in Oklahoma for an accounting against his guardian appointed by an Oklahoma court. In the contest of the jurisdiction of the District Court on the ground of lack of diversity of citizenship, evidence was offered to show that the plaintiff, after being adjudged incompetent in Oklahoma, had moved to Arkansas with the consent of his guardian. The Circuit Court of Appeals reversed the finding of the District Court that there was diversity of citizenship, and remanded the case for further evidence of plaintiff's ability to choose a domicile. The court held at page 533:

> "Where a person has been adjudged incompetent and placed under the care and control of a guardian or committee, a presumption arises that he has not sufficient mental capacity to change his domicile, but the presumption may be rebutted by satisfactory proof that he possesses the requisite mental capacity."

The burden was placed upon those claiming a change to prove that the ward had sufficient mental capacity to establish a new domicile.

In *McCambell vs. McCambell,* 13 F. Supp. 847 (1936), an action was brought in the United States District Court of Kentucky by the guardian of an incompetent to obtain an accounting of rents and profits fraudulently obtained by the defendants. Jurisdiction of the court was sought on the grounds of diversity of citizenship, since, after having been adjudged insane, the incompetent had moved to South Africa and it was claimed that he had there established citizenship and domicile. In dismissing the action for lack of diversity of citizenship, the District Court held, on page 849 of its decision:

> "After a person has been duly adjudged a lunatic by a court of competent jurisdiction, it is presumed that he is incapable of intelligent action, and has no power by his own will or act to change his state or national domicile from the place thereof at the time or after he becomes incompetent, because he lacks the mental capacity to exercise either choice or intention —twin elements generally regarded as essential to a change of domicile or citizenship. In other words, the domicile or citizenship of one becoming mentally incompetent remains his citizenship until his sanity has been restored."

In re Edmundson, 167 Allegheny 502, 109 Pa. Super. 495 (1933), arose on an appeal from an order of the Allegheny County Court of Common Pleas refusing to vacate an appointment of a guardian. The petition alleged that the incompetent, having long been a resident of Westmoreland County, could not change his domicile by reason of his mental incapacity. The Superior Court reversed the Court of Common Pleas and held at page 503:

> "If one is insane or so feeble minded as to be unable to take care of his property and to require the protection of a guardian to do so, he is also incapable of changing his settlement or residence within the

contemplation of the Act of 1907 (19 *C. J.* 417, 418) by a transient or a temporary visit elsewhere."

In a report of later litigation over the same subject matter, *In re Edmundson,* 173 Allegheny 708, 113 Pa. Super. 472 (1934), an appeal was taken from an order of the Westmoreland County Court of Common Pleas appointing a guardian for the same incompetent. There it was likewise shown that the incompetent, having long been a resident of Westmoreland County, had physically moved to Allegheny County and was then living there. The Superior Court affirmed the ruling of the lower court, citing its decision in the earlier case that the incompetent's domicile remained in Westmoreland County, as conclusive in the case.

In the case of *In re Collins,* 11 N. J. Misc. 233, 165 A. 285 (1932), the incompetent decedent, having as a child the domicile of her parents in New York, was sent to live in New Jersey where she resided until her death. Administration of her estate in New Jersey was contested on the ground that she was not a resident of that state. The Surrogate's Court of New Jersey held that she was not a resident of that state since the domicile of her minority continued by virtue of her lack of ability to form an intention to change domicile. The court held at page 235:

> "An incompetent person is generally assumed in law not capable of forming an 'intention' to change domicile."

A similar situation arose in *Commonwealth vs. Kernochan,* 129 Va. 405, 106 S. E. 367, 30 A. L. R. 601 (1921). The decedent having been domiciled in New York became incompetent and was sent to Virginia where she resided under the care of an institution for many years prior to her death. Her guardian had been appointed by the courts of New York and had as such administered all matters pertaining to her estate and welfare. Upon her death the

Commonwealth of Virginia brought suit to collect intangible property taxes accrued during the period of her residence in that state.

In affirming a judgment for the defendant, the Supreme Court of Appeals of Virginia held that decedent's domicile had remained in New York in spite of her long residence in Virginia; that her domicile having originally been in New York, she lacked the mental capacity to change it; and that her guardian lacked the power to make a change in her quasi-national or state domicile for her.

Stanfield vs. Hursey, 36 Ga. App. 394, 136 S. E. 826 (1927), was a suit by a creditor against the guardian of a debtor who, after being adjudged insane, left the state. Defendant pleaded the statute of limitations. The judgment for the plaintiff was reversed by the Court of Appeals, holding that the statutory suspension of the statute of limitations by the removal of a debtor from a state with intent to change his domicile did not apply. In a syllabus opinion, the court held at page 395:

> "As to a person *sui juris,* the matter of making a change in domicile is one involving the exercise of volition and choice. A person who has been adjudged insane cannot, by his own act or volition, effect a change in his domicile.
>
> "Where a resident of this state was adjudged insane by the courts of this state in the year 1910, he was at least *prima facie* incapable thereafter of making a change of his domicile."

Petitioner was further assisted in the cases at bar by the presumption of the continuing incompetency of the decedent. The issue of incompetency had been tried and found to exist not only in the Ohio courts but in the Probate Court of Wayne County, Michigan. There was a total lack of evidence before the Probate Court to overcome the presumption that the incompetency of the decedent continued to the date of her death. That such a presumption exists was held by the Supreme Court of Ohio in *Kennedy*

vs. Walcutt, 118 O. S. 442 (1928), the syllabus of which case reads, in part, as follows:

> "4. While every person is presumed to be of sound mind, yet when a person has been declared insane by a court of competent jurisdiction and is under guardianship, the presumption of sanity is not only removed but a presumption of insanity arises. Where a will of such a person, made after such adjudication, having been admitted to probate, becomes the subject of a will contest, the burden of proof by statute being cast upon the contestants of the will, the presumption of continuance of such insanity was a rebuttable one and would be removed when sufficient evidence had been introduced to meet, extinguish, rebut, countervail or overcome such presumption arising from the adjudication of insanity."

In *Texas vs. Florida,* 306 U. S. 398 (1939), the Supreme Court of the United States has held that the burden of proof is on one asserting that an earlier domicile was abandoned in favor of a later one. The court cited *Mitchell vs. United States,* 88 U. S. 350 (1874) in which the court held at page 353:

> "A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be an *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

In *Chew vs. Nicholson,* 281 Fed. (Del.) 400 (1922), it was held that residence alone, however long continued, will not effect a change in domicile and that a person mentally

incompetent to change his domicile retains the domicile which he had when he became incompetent.

An interesting and significant case is *Hayward vs. Hayward*, 65 Ind. App. 440 (1917), in which there is a very able opinion by Judge Caldwell. The case involved distribution of the estate of Sarah M. Drew who had become mentally incompetent prior to a date on which relatives had taken her from Kentucky to Indiana where a guardian was appointed for her person and estate. The issue turned on the question of change of domicile. It was taken by the Court as conceded that the decedent's mental condition was such that she could not have changed her domicile. (In this respect the case is particularly applicable to those at bar because the evidence shows that Anna Hatt was too incompetent to change either her domicile or legal residence from Cuyahoga County prior to the time she last went to Detroit.)

The court held at page 461:

> "We conclude that, while the question is not free from difficulty, the guardian of an insane person does not have the power or authority, by virtue of his office, on his motion to change the legal domicile of his ward from one state to another, so as to affect the distribution or succession of ward's property on his decease, and especially where the ward, although residing in the jurisdiction of the appointment, is legally domiciled in another state."

In the opinion overruling application for re-hearing, 65 Ind. App. 469 (1917) the court said:

> "The evil results that might flow from the recognition of such a power unrestricted in the next of kin of such a person, and especially in but a part of the relatives composing the nearest degree of consanguinity, are illustrated by the possibilities here. It so happens that if Sarah M. Drew were legally domiciled in Indiana, rather than in Kentucky, at the time of her decease, appellees profit thereby. If she were legally domiciled in Kentucky, rather than in Indiana, appel-

lant profits thereby. Appellant and appellees stood in the same degree of consanguinity to Sarah M. Drew. If the latter, by reason of their relationship, had the power to change her domicile from Kentucky to Indiana, then the latter [former], by reason of a like relationship, had the power to prevent such change, or to rechange her domicile back to Kentucky. It thus appears that the recognition of such an unrestricted power might involve a constant contest among the relatives of an aged incompetent for the possession of his person, and to the destruction of the peace and comfort of his last days. It is proper to say, however, that the record here reveals no hint of suspicion that appellees, or their mother, or the guardian, were moved by any other than the best and purest motives in any action taken by them respecting Sarah M. Drew in the days of her alleged incompetency."

The sixth paragraph of the syllabus reads as follows:

"Where one mentally incompetent was removed by relatives from her domicile in one state to another state, she could not, because of her mental incapacity, have formed an intention to change her domicile, and the length of time that she resided in the latter state is of itself unimportant."

From the foregoing authorities it is certain that there was not sufficient evidence in the record to overcome the presumption of Anna Hatt's domicile continuing to be in Cuyahoga County, Ohio. Furthermore, the evidence affirmatively showed that Anna Hatt's domicile was in Cuyahoga County, Ohio. The Probate Court there had jurisdiction of Anna Hatt and her affairs and the Michigan court could not have possibly had jurisdiction to admit any purported will of hers to probate and if it attempted to do so, its order cannot be recognized in the Ohio courts.

The principle of *Manuel vs. Manuel*, 13 O. S. 458 (1862) applies squarely to the cases at bar. That case decided that an exemplified copy of a will of a person domiciled in Ohio cannot be brought from any other state and admitted to

record in Ohio, because *the only court having jurisdiction to admit the will to original probate would be in Ohio.* In that case the decedent, domiciled in Ohio, executed, a holographic will while in New Orleans on a business trip. Upon his death, a year later, the will was taken to New Orleans and there admitted to probate under the laws of Louisiana recognizing a will in holographic form. An authenticated copy of the probate was thereafter admitted to record in Ohio. In an action in the Common Pleas Court of Hamilton County, the order admitting the will to record was set aside and upon appeal to the District Court, the cause was ordered reserved to the Supreme Court for decision. The Supreme Court, affirming the decision of the Court of Common Pleas, held that the law permitting a foreign will, proved and executed according to the laws of another state, to be admitted to record in this state applied only to wills proved in a court which had *jurisdiction* to make the original probate. In quoting *Wallace vs. Wallace,* 2 Green's Ch. Rep. 616, the court said, at page 469:

> "The practice of first proving our wills in other states, has never yet obtained."

It is important in the cases at bar that Mr. Kistner called no witnesses nor did he offer any evidence in support of the Michigan will except the exemplified copy of the Michigan Probate Court decree, containing the finding that Anna Hatt was an "inhabitant" of Wayne County, Michigan.

RE ERRORS PRESENTED IN THE SIXTH QUESTION.

Section 10511-8 of the General Code, providing that an authenticated copy of a foreign will must be brought by the executor or by a person interested therein to the Probate Judge of the county where there is some estate of the decedent, reads as follows:

> "A copy of the will and probate thereof, duly authenticated, must be produced by the executor, or by a per-

son interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon such judge shall continue the motion to admit it to probate for two months. Notice of the filing of such application must be given to all persons interested, in some public newspaper printed or in general circulation in the county where the motion is made, at least three weeks consecutively. The first publication shall be at least forty days before the time set for the final hearing of the motion."

The alleged Michigan will in the cases at bar was presented by John R. Kistner as an individual and not as attorney for Anna Latham, the executrix named therein. He did not claim that he submitted it as attorney or agent for the executrix. He claimed that he offered it individually. He attempted to prove that he, individually, was an interested party and had the right to offer the alleged Michigan will for record in Cuyahoga County and thereby repudiated any possible inference that he was acting either as attorney or as agent for the executrix.

Kistner was permitted to testify over objection made under Section 11495 of the General Code of Ohio that he was a creditor of Anna Hatt; that he had been employed by her in her lifetime and had rendered certain services for her. The Probate Judge ruled that the only limitation on Kistner's right to testify was that he could not tell how much was due him as a creditor.

Section 11495 of the General Code, so far as pertinent here, reads:

> "A party shall not testify when the adverse party is * * * an executor or administrator or claims or defends as heir * * * devisee or legatee of a deceased person * * *"

By their rulings, the Supreme Court and the Court of Appeals affirmed the Probate Judge's error in permitting Kistner to testify over objection.

It does not require citation of authorities to demonstrate that the entire effect of Section 11495 of the General Code of Ohio will be destroyed if a person asserting claims against a decedent can prove that he is a creditor by his own testimony, leaving to the other evidence heretofore permitted by this statute only the question of the amount of his claims.

In reference to the Constitutional question, it will be noted that it is specifically provided in Title 28, U. S. C. A., Section 344, paragraph (b), Section 237, Judicial Code as amended, that:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; * * *; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, * * *; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *"

It is significant in the cases at bar that Hon. Lee E. Skeel, the judge of longest experience in the Court of Appeals, dissented from the refusal of that court to grant the petitioner's applications for re-hearing, and also that decisions in the Supreme Court of Ohio dismissing petitioner's appeals for the stated reason that no debatable constitutional questions were involved, were not unanimous, although all seven judges participated in the hearing.

CONCLUSION.

It is believed that, in the light of the substantial authorities herein cited, the state courts erred in giving effect to the Michigan decree as binding under the full faith and credit clause of the Constitution of the United States, in giving any weight to the finding of domicile contained in that decree, in losing sight of the unrebutted presumptions giving rise to the conclusion that Anna Hatt died domiciled in Ohio, in overlooking the uncontroverted evidence of the domicile of the decedent in Ohio, and in approving the ruling permitting an adverse party to testify against the estate. The decision in the state courts in these cases, if allowed to stand, would cause considerable uncertainty as to the law and lead to innumerable controversies in many substantial estates throughout the United States. Upon these grounds, it is believed that the decisions of the state courts should be reversed.

Respectfully submitted,

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